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No. 02-649

Supreme Court of the United States

DEE-K ENTERPRISES, INC. AND
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Heveafil Sdn. Bhd. ("Heveafil") is not a publicly held entity. Heveafil's parent corporation is Permodalan Nasional Berhad, which owns ninety-one percent of Heveafil. Permodalan Nasional Berhad is not a publicly held entity.

Filmax Sdn. Bhd. ("Filmax") is not a publicly held entity. It is wholly owned by Heveafil.

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STATEMENT OF THE CASE

The trial in this case presented a straightforward application of *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), in which this Court held that Sherman Act liability for a foreign conspiracy requires proof of an intended and actual "substantial effect" in the United States. *Id.* at 796. Before trial, Petitioners readily acknowledged their evidentiary burden: "Under *Hartford Fire Insurance*, Plaintiffs must and will show that the conspiracy had the intended and actual effect of injuring purchasers in the United States by causing them to pay higher prices for elastic rubber thread than they would have otherwise paid." C.A. App. 268 (Petitioners' Pre-trial Brief). Late in the trial, however, after it became apparent that Petitioners would not meet that burden, they disputed the applicability of *Hartford Fire* for the first time. The trial judge rejected Petitioners' attempt to escape their burden, and eight jurors found unanimously that Petitioners had not proved any "substantial effect" in the United States. A Fourth Circuit panel affirmed unanimously. Contrary to Petitioners' urging of some sort of circuit split, the Fourth Circuit expressly relied on *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), and *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000). *E.g.*, Pet. App. at 25a (Fourth Circuit stating that its approach "echoes that of the Third Circuit in *Carpet Group*"); at 26a ("As in *Nippon Paper*, the agreements here were all formed entirely outside the United States—in several other countries.").

A. Petitioners brought this case against extruded rubber thread ("ERT") producers in Malaysia, Indonesia, and Thailand, alleging that the producers met on various occasions in Southeast Asia to fix ERT prices worldwide during 1991-96. Respondents are the Malaysian-owned Defendants who contested Petitioners' claims and appeared at trial. The other Defendants settled or defaulted.

Petitioners' evidence of a conspiracy consisted mainly of two videotaped depositions. One deponent testified to the formation of a conspiracy in Southeast Asia, but he never testified that it was carried out in the United States. The other, who the jury learned Petitioners had paid $32,000 for his deposition, testified about a Southeast Asian conspiracy regarding talc-ERT, but he also testified that the conspiracy did not cover silicon-ERT, the only product that Petitioners and most other U.S. customers purchased. C.A. App. 1467-72. The second deponent also specifically disclaimed any knowledge about the U.S. market for ERT. *Id.* at 1467. Neither deponent—indeed no witness at trial—testified that priced-fixed goods were ever sold in the United States.

In contrast, Respondents called numerous live witnesses—including current and former employees and customers—who testified that during the alleged period of the conspiracy, Respondents were forced to raise prices in the United States due to U.S. antidumping duties and increases in raw material costs. One witness, a U.S. trade lawyer for Malaysian ERT producers, testified that he told his clients "they were in a big mess" because of the "counterintuitive" purpose and "complexity" of the U.S. antidumping laws. *Id.* at 803-04. He elaborated: "[T]he reason Congress wrote this law was to force foreign companies to raise their prices in the U.S. I mean that is the basic purpose of the law. And all of the technical features in the law are driven around creating that outcome as much as possible." *Id.* at 804. Notably, during the entire alleged period of the conspiracy, Respondents *never raised prices enough* to satisfy the U.S. Government and as a result were continually hit with trade penalties designed to raise their prices. *Id.* at 836-38.

A worldwide latex-price spike only exacerbated Respondents' antidumping predicament. As one witness testified, "latex was the single most important cost element" in ERT, therefore all ERT producers, domestic and foreign,

increased prices in response to the latex-price spike. *Id.* at 836. Unlike their U.S. competitors, however, Respondents were unable to absorb increased latex costs because the antidumping duties dictated that increases in costs yield corresponding increases in price. *E.g.*, *id.* at 1191 (testimony that "[w]henever the latex price would go up a penny per pound of rubber thread, to produce a pound of rubber thread, they had to increase their price by a penny; otherwise, they had to pay it to the U.S. government").

Numerous witnesses testified that notwithstanding the antidumping duties and latex-price increases, Respondents engaged in vigorous competition against one another and even against U.S. producers (who were not saddled with antidumping penalties). Respondents' U.S. sales personnel testified to cutthroat competition to maintain market share. *E.g.*, *id.* at 3575-77. Customer-witnesses confirmed this price competition. *E.g.*, *id.* at 1074, 1102-04, 1133-35. Indeed, Petitioners' own pricing data confirmed this vigorous competition, showing disparities among what Respondents charged, and between what the two Petitioners paid for contemporaneous purchases from the same Respondent. *E.g.*, *id.* at 3746-48, 4011. Petitioners' data also confirmed a direct correlation between price increases and the recurring imposition of trade penalties and increases in latex costs. *E.g.*, *id.* at 4017, 4022.

Moreover, Respondents' U.S. sales personnel specifically disclaimed any knowledge of, or participation in, price fixing, and also testified to independence and discretion in setting U.S. prices. *E.g.*, *id.* at 1033 ("We determined price in the United States. They sold in 60 or 80 countries and this was just another one of them. That's why they hired us, to sell here."). Thus, no price-fixing conspiracy could have been successfully implemented in the United States without the knowledge and cooperation of the U.S. sales personnel,

but Petitioners never attempted to prove such knowledge or complicity.

In contrast to Respondents' substantial evidence that their U.S. prices were driven by legitimate market and regulatory forces, the lay testimony of Alan Hays constituted Petitioners' sole attempt to prove that the conspiracy alleged actually caused higher prices in the United States. Mr. Hays testified to so-called "price differences" that Petitioners paid during the alleged period of the conspiracy. He calculated the "price differences" by taking the price Petitioners paid for Malaysian ERT in 1991 and projecting it forward for the years 1992-96 using the U.S. producer price index ("PPI")—accounting for no other factor. Petitioners attributed any "price difference" above that general, inflationary index to a conspiracy, but their effort did not withstand the cross-examination of Mr. Hays:

> Q: You don't know whether the differences in prices that you have come up with, whether those are attributable to a price-fixing conspiracy, correct?
>
> A: No, I have no knowledge of that.
>
> Q: And you don't know whether the differences are due to increased raw material costs, correct?
>
> A: I have no knowledge of it.
>
> Q: You don't know whether the increases are because of dumping duties, correct?
>
> A: No, I do not.

C.A. App. 724-25.

B. As Petitioners alleged a conspiracy formed entirely outside the United States, the District Court found that *Hartford Fire* governed and accordingly instructed the jury using this Court's "substantial effect" language. *Id.* at 1340. The court also issued a special verdict form. The first question asked: "Was there a conspiracy, involving one or more of the Defendants, to fix the prices of extruded rubber

thread, which was intended to have a substantial effect in the United States?" *Id.* at 3665. The jury answered "Yes." *Id.* The second question asked: "Did the conspiracy have a substantial effect in the United States?" *Id.* The jury answered "No." *Id.* Upon that unanimous verdict, the court entered judgment in favor of Respondents.

The jury's "No" on question two made it unnecessary to proceed to the other questions prerequisite to a finding of liability: (i) whether each Respondent knowingly participated in the conspiracy; (ii) whether Petitioners' claims were barred by the statute of limitations; (iii) whether Petitioners purchased products covered by the conspiracy; and (iv) whether Petitioners could prove reasonably ascertainable damages from such purchases. C.A. App. 3665-69.

After trial, Petitioners filed a post-verdict motion for judgment as a matter of law ("JMOL") under Rule 50 of the Federal Rules of Civil Procedure, or in the alternative for a new trial under Rule 59. Petitioners had not moved for JMOL at any time during trial, however, and the District Court denied them JMOL on that basis. Pet. App. 29a.[1] The District Court also denied a new trial, concluding that the jury's finding of no substantial effect was not against the clear weight of the evidence. *Id.*

The Fourth Circuit unanimously affirmed, holding (i) that the District Court properly instructed the jury according to *Hartford Fire* because the evidence showed a "primarily foreign" conspiracy formed entirely in Southeast Asia, Pet.

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[1] In contrast, Respondents preserved their objections to Petitioners' failures of proof by moving for JMOL three times at trial, and the court reserved the possibility of entering JMOL for Respondents, submitting the case to the jury only conditionally. C.A. App. 1199 ("I'm not going to deny it. . . . I'm going to submit the case to the jury subject to the 50(b) motion.").

App. 26a-27a, and (ii) that the jury's finding of no substantial effect was supported by "a good deal of evidence" at trial. *Id.* at 7a n.1.

C. A critical misstatement of the case warrants special attention. Throughout, Petitioners refer to price-fixed goods being sold in U.S. commerce. *E.g.*, Pet. 2, 3, 5, 6. But Petitioners proved no such thing, and the jury found no such thing. The jurors found a conspiracy (defined to them simply as an "agreement" or "meeting of the minds") in Southeast Asia to raise the price of ERT sold worldwide, including the United States, but the jurors also found that whatever conspiracy existed in Asia never resulted in a "substantial effect" in the United States. The jurors obviously credited the witness testimony and documentary evidence that Respondents' U.S. prices were not the result of a conspiracy, and found as the Fourth Circuit did that there was "a good deal of evidence" that "increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases." Pet. App. 7a n.1.

REASONS FOR DENYING THE PETITION

Petitioners waived the arguments on which they premise their questions presented; the Fourth Circuit reached the correct result (including affirmance of a fact-bound jury verdict); and there is no circuit split. This case does not raise any question warranting this Court's review.

I. PETITIONERS WAIVED THE ARGUMENTS THEY NOW ATTEMPT TO RAISE.

Petitioners demanded a trial by jury, but *never* moved to make the substantial-effect question one for the court rather than the jury. Before trial and well into trial, Petitioners acknowledged that they were required to prove both elements of the *Hartford Fire* test. Only mid-trial did Petitioners first object to *Hartford Fire*, and then only on the ground that it did not apply at all. These and other waivers prevent this

case from raising either of Petitioners' questions presented—viz., whether a plaintiff has the "option" of satisfying *Hartford Fire* or some other test, and whether, in this case, substantial effect was a question for the court rather than for the jury.

Petitioners describe their "vigorous objection" to, and "sharp disagreement" with, *Hartford Fire*, Pet. 2, 4, but fail to mention that they first voiced their objection and disagreement after they had already acknowledged their *Hartford Fire* burden repeatedly in writing and in open court, after the jury had been given its opening instructions and after the trial was more than half over. As noted above in the Statement of the Case, Petitioners' Pre-trial Brief stated: "Under *Hartford Fire Insurance*, Plaintiffs must and will show that the conspiracy had the intended and actual effect of injuring purchasers in the United States by causing them to pay higher prices for elastic rubber thread than they would have otherwise paid." C.A. App. 268.

Along with that brief, Petitioners filed proposed jury instructions that assigned the effect question to the jury: "This means that if you find that there was a conspiracy which affected the U.S. price levels of Extruded Rubber Thread, then it is established that the conspiracy affected U.S. commerce and the Sherman Act applies." *Id.* at 3663. Petitioners also filed a proposed jury instruction assigning the burden of proof to them on each element of their case.

On the eve of trial (literally) Petitioners filed a brief on proposed *pre-trial* jury instructions to be given at the start of the case:

> Plaintiffs propose amending the fifth sentence of their Sherman Act instruction as follows: "The Sherman Act applies to conduct abroad, so long as the foreign conduct was meant to have and did have a substantial effect on United States commerce."

. . . .

> . . . Plaintiffs' proposed changes to their Sherman Act preinstruction incorporate *Hartford Fire* and cure Defendants' objections without misstating the law.

District Court Docket Entry No. 157 at pp. 1-2, 9.

Accordingly, trial proceeded with Petitioners' recognition that they had to prove both elements of the *Hartford Fire* test. C.A. App. at 291 (court's remarks to jury pool: "Now, plaintiff who alleges a foreign price-fixing conspiracy must show that the conspiracy was intended to have and did have a substantial effect in the United States. And that is a thumbnail sketch."); at 330 (same to impaneled jury). Petitioners reiterated this burden in their opening statement: "Because as the Judge instructed you, it would be our duty not only to show a cartel that raised prices in America generally. We would have to show you that it raised prices to our two particular buyers here in North [Carolina] and Virginia." *Id.* at 375.

On the fifth day of the eight-day trial, Petitioners' lead counsel (counsel of record here) stated during a colloquy with the court that "under Hartford Insurance, I have a duty to show that the conspiracy caused adverse effects in the United States that are outside or different from those caused by the dumping law." C.A. App. 898. Later that day, Petitioners reversed themselves and filed a brief arguing that *Hartford Fire* did not apply at all. *See* District Court Docket Entry No. 233. The brief did *not* argue for a disjunctive or other reformulation of the two-part *Hartford Fire* test, nor that the test entailed a burden-shifting analysis, nor that Petitioners had the option of meeting the *Hartford Fire* test or some other test, nor that either element of the test was a question for the court rather than the jury. *Id.* The brief simply argued that *Hartford Fire* did not apply to this case.

Subsequently, at the charge conference, the court rejected Petitioners' belated attempt to escape their burden of proof and held them to the *Hartford Fire* test they had embraced until mid-trial. Petitioners proceeded to object to the inclusion of the words "substantial effect" in the jury instructions. Pet. App. 36a. Petitioners never argued, however, that because of overwhelming evidence or for any other reason the substantial-effect question was for the court rather than for the jury, nor did they argue that any burden had shifted to Respondents to disprove substantial effect. *Id.* at 34a-38a.

Moreover, Petitioners elected *not* to move for JMOL on substantial effect or any other issue at trial—despite the court's express invitation to do so. Pet. App. 29a & n.2; C.A. App. at 1095-96 ("Both counsel are reminded not to forget whatever motions at the close of all the evidence they need to be making on the record."); at 1148-49 (Petitioners declining court's invitation to move for JMOL); at 1198-99 (Court: "Do you renew your motion?" Mr. Curran: "Yes, Your Honor." Court: "Anything for the plaintiff?" Mr. Davidow: "No."). After trial, the District Court denied Petitioners' post-verdict motion for JMOL because of that waiver. Pet. App. 7a ("The district court denied . . . a late-filed Rule 50 motion for judgment as a matter of law on the substantial-effect question."); Pet. App. 29a. Finally, Petitioners elected *not to appeal* the denial of their post-verdict motion for JMOL. Pet. App. 7a n.1 ("Dee-K does not appeal the denial of its Rule 50 motion. It does, however, appeal the denial of its motion for a new trial, asserting that the jury's finding of no substantial effect was against the weight of the evidence."). Petitioners therefore waived *every* opportunity for JMOL (i.e., judgment by the court rather than the jury) on substantial effect or any other issue.

Whether Petitioners viewed the substantial-effect question as one they had proved or as one that had become a

purely legal question for the court because of some showing at trial, Petitioners were required to move for JMOL to keep the issue from the jury's purview and preserve either argument for appeal:

> It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. . . . Similarly, the litigant who has not moved for directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view.

9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2536 (2d ed. 1995) (quoting *Little v. Bankers Life & Cas. Co.*, 426 F.2d 509, 510-11 (5th Cir. 1970)) (internal quotation marks omitted) (emphasis added); *see also, e.g.*, *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 187 (4th Cir. 1994) ("[I]mplicit in the party's failure to move for judgment as a matter of law is the belief that the evidence created a jury issue . . . .").

Furthermore, Petitioners' trial-end objection to the inclusion of the words "substantial effect" in the jury instructions neither constituted a motion for JMOL on that issue nor otherwise preserved for appeal any argument that the issue was one for the court rather than for the jury:

> A party who wants to challenge the propriety of submitting a given claim or defense to the jury is obliged to make a motion under Fed.R.Civ.P. 50(a) at some time prior to the submission of the case to the jury. . . . If a party could avoid the necessity of a Rule 50 motion simply by attacking the judge's decision to give certain jury instructions, the clarity achieved by the Rule 50 process would be compromised and little would be left of the general rule.

Savino v. C.P. Hall Co., 199 F.3d 925, 931 (7th Cir. 1999); *cf., e.g., McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 360 (9th Cir. 1996) (holding that an objection to an instruction on the specific ground of insufficient evidence for submission of the question to the jury may be a "sufficient approximation" for a *renewal* of a *prior motion* for JMOL).

By electing not to move for JMOL and confining their eleventh-hour objection merely to whether *Hartford Fire* applied at all, Petitioners waived any argument for a disjunctive or other reformulation of the two-part test, an option of meeting some other test, a burden-shifting analysis, or an assignment of part of the test to the court. For these reasons, the Fourth Circuit specifically held that "we need not decide whether the *Hartford Fire* formulation is the *only* test for jurisdiction in antitrust cases involving foreign conduct, because Dee-K has waived this argument by failing to pursue it in the district court." Pet. App. 15a n.5 (emphasis in original). Because of these waivers at trial and on appeal, this case raises neither of Petitioners' questions presented.[2]

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[2] In addition to waiving the arguments they raise now in their questions presented, not one of Petitioners' authorities stands for the proposition that substantial effect is a question for the court rather than the jury. *See Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-02 (1969) (finding that $190,000 in sales under a domestic tying arrangement were not so insubstantial as to warrant summary judgment for defendants, and reversing and remanding for trial this "question of fact"); *Burke v. Ford*, 389 U.S. 320, 321-22 (1967) (holding that where trier of fact found that defendants *had in fact accomplished* a horizontal division of an entire intrastate market, domestic test for effect on interstate commerce was met); *Gough v. Rossmoor Corp.*, 487 F.2d 373, 377 (9th Cir. 1973) (stating that where jurisdictional and merits issues are "completely intermeshed," both are jury questions); *Wirtz v. LaFitte*, 326 F.2d 856, 859 (5th Cir. 1964) (holding that employee's coverage under Fair Labor Standards Act was question of law when "undisputed facts" showed employment was directly related to interstate commerce); *Las*

II. *HARTFORD FIRE* COMPELLED THE FOURTH CIRCUIT'S HOLDING.

Petitioners appealed two issues to the Fourth Circuit: (i) whether the District Court erred in using *Hartford Fire*'s substantial-effect language in the jury instructions and special verdict form, and (ii) if not, whether the District Court erred in denying Petitioners' motion for a new trial, because the jury's finding of no substantial effect was against the clear weight of the evidence. Pet. App. 7a & n.1. The Fourth Circuit correctly affirmed on both issues, because like *Hartford Fire*, this case alleged a conspiracy formed entirely outside the United States, and there was ample evidence to support the jury's finding of no substantial effect.

A. In *Hartford Fire*, the plaintiffs alleged that domestic and foreign insurance companies (including foreign subsidiaries of U.S. corporations) "conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States," and actually limited that coverage. 509 U.S. at 770, 795-96, 819 n.10. The District Court dismissed the claims that named only certain London-based defendants on the basis of international comity. *Id.* at 778. One of these claims included domestic reinsurers as "unnamed co-

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Vegas Merch. Plumbers Ass'n v. United States, 210 F.2d 732, 748 (9th Cir. 1954) (holding in a domestic case that a question of effect on commerce "is clearly a question of fact" properly submitted to the jury); *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173, 195 (D. Mass. 1999) (submitting to the jury the issue "whether the volume of commerce affected by the conspiracy was substantial"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1174, 1176 (E.D. Pa. 1980) (noting that "preliminary pretrial determinations of the commerce nexus rest on a lesser showing than determinations of the same question at trial," and "when the jurisdictional and substantive issues become intertwined, consideration by a jury may become optional in the court's discretion").

conspirators." *Id.* at 777 & n.5. The Ninth Circuit reversed, holding that comity was no bar to Sherman Act jurisdiction, and this Court granted certiorari "to address the application of the Sherman Act to the foreign conduct at issue." *Id.* at 779. As part of its decision reversing the Ninth Circuit, this Court held:

> At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. Although the proposition was perhaps not always free from doubt, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.

Id. at 795-96.

There was one exception to the Court's general comment about the London reinsurers conceding jurisdiction. Before turning to the comity question, the Court specifically noted that one holdout among the London reinsurers contested subject-matter jurisdiction, arguing that "the Sherman Act does not apply to its conduct in attending a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance contracts." *Id.* at 795 n.21; *see also id.* at 796 n.22, 797 n.24 (noting that subject-matter jurisdiction was at issue and took priority over the comity question).

The Court held that the defendant "may have attended only one meeting, but the allegations, which we are bound to credit, remain that it participated in conduct that was intended to *and did in fact produce a substantial effect on the American insurance market*." *Id.* at 795 n.21 (emphasis

added). Thus, because of the "foreign conduct" alleged, the Court's jurisdiction over the Sherman Act claims at issue depended on the allegations of intended and actual "substantial effect" in the United States.

The Court did not define "conduct," but the conduct at issue in Section One claims is clear: "the essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it . . . ." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991). This Court's repeated references to "foreign conduct" in *Hartford Fire*, therefore, were to the foreign agreements giving rise to the three claims at issue.[3]

The Court necessarily determined the "foreignness" of those agreements based on their formation abroad, rather than their target markets or the national affiliation of their participants, because all three agreements targeted the U.S. market and one included domestic reinsurers as participants. 509 U.S. at 795. One of the agreements also included overt acts in furtherance within the United States. *See In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 490 (N.D. Cal. 1989) (District Court in *Hartford Fire* noting that all three agreements were formed abroad and that one included overt acts in furtherance within the United States).

Significantly, the foreign situs of the conspiratorial agreements at issue in *Hartford Fire* was *not* dispositive of *whether* the Sherman Act applied—but instead was

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[3] When the Fourth Circuit rejected Petitioners' argument that *Hartford Fire* cannot apply if there are U.S. acts in furtherance, it noted that in *Hartford Fire* "at least one key meeting attended by London-based defendants occurred in New York City." Pet. App. 18a. The Fourth Circuit was aware, however, that the relevant agreements in *Hartford Fire* were formed abroad. Pet. App. 11a (describing *Hartford Fire* agreements as "formed abroad").

dispositive of the *test* used to determine the Act's applicability. The Court found that the Act applied because the foreign agreements were alleged to have had an intended and actual "substantial effect" in the United States. 509 U.S. at 795-96.

Because *Hartford Fire*'s test applied to foreign agreements among both foreign and domestic participants, targeting the United States, with overt acts in furtherance in the United States, that test necessarily applies here—where it is undisputed that Respondents "never met in the United States." Pet. App. at 6a; at 10a, 23a, 26a, 27a (same); *see also* Pet. 8 (conceding that "the price-fixing meetings were held in Asia").

B. The jury's fact-bound verdict was not against the clear weight of the evidence. As the Fourth Circuit found in affirming the denial of a new trial, Respondents "provided the jury with a good deal of evidence supporting" the jury's finding that there was no substantial effect in the United States, "including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases." Pet. App. 7a n.1.

C. Petitioners are wrong in arguing that the Fourth Circuit's affirmance is contrary to this Court's other precedents. Petitioners completely ignore the divergence between the different tests for Sherman Act jurisdiction over foreign versus domestic agreements.

The *Hartford Fire* foreign-conduct test derives directly from *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416 (2d Cir. 1945). In *Matsushita*, U.S. companies brought a predatory pricing claim under Section One against Japanese companies and their U.S. subsidiaries, alleging that the defendants formed a cartel in Japan to raise the price of televisions in that country

while selling televisions at artificially depressed prices in the United States. 475 U.S. at 577-78. The Court held that the plaintiffs could not recover based solely on proof of price-fixing in Japan because they also had to prove actual price-cutting in the United States: "The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. . . . For this reason, [plaintiffs'] theory of recovery depends on proof of the asserted price-cutting conspiracy in this country." *Id.* at 582 n.6.

In *Alcoa*, the United States claimed that foreign companies violated the Sherman Act by forming two agreements outside the United States to control the output and price of aluminum—including aluminum the defendants sold in the United States. The court held:

> [T]he Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. . . .
>
> Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.

148 F.2d at 444. Applying this standard, the court concluded that the Sherman Act did not reach one agreement because that agreement specifically excluded the United States, but did reach the other because of its intent to affect U.S. imports and its actual effect on those imports. *Id.*[4]

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[4] Petitioners argue that *Alcoa*'s comment about "persons not in allegiance" to the United States means that the "effects" test does not apply to U.S. entities. Pet. 13. But *Alcoa* was merely noting that "any state may impose liabilities, *even* upon persons not within its allegiance,

In *Hartford Fire*, then, this Court relied on two cases that applied the "effects" test to agreements formed outside the United States with ensuing U.S. sales.[5] The Court did *not* rely on any of the domestic-agreement cases that Petitioners urge here, for good reason: the test for Sherman Act jurisdiction over domestic agreements set forth in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), is wholly distinct from the test applied in *Hartford Fire*. In *McLain*, the issue was "whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property." *Id.* at 234. The agreement was confined to the New Orleans area, and the Court held that the Sherman Act reaches "beyond activities *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce." *Id.* at 241 (collecting cases). The

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for conduct outside its borders that has consequences within its borders which the state reprehends." 148 F.2d at 443 (emphasis added).

[5] The Court cited three other cases: *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 706 (1962) (applying Sherman Act to a conspiracy formed in the United States and carried out here and abroad); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (same); and *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (applying Lanham Act to infringement abroad because of U.S. effects). Thus, Petitioners' selective quotation of *Continental Ore*, Pet. 10, ignores the dispositive point: "the conspiracy was laid in the United States, [and] was effectuated both here and abroad . . . ." 370 U.S. at 706.

The Court also cited the *Restatement (Third) of the Foreign Relations Law of the United States* § 415 and Reporters' Note 3 (1987). The *Restatement* sets forth a three-step, "sliding-scale" formulation that the Court did not adopt. Nonetheless, Section 415(3) of the *Restatement* would require the "substantial effects" test on the facts here. *See also* Pet. App. 15a n.5 (Fourth Circuit holding that Petitioners waived any argument for the *Restatement*'s "principal purpose" test).

Court continued: "[T]he jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." *Id.* at 242 (collecting cases).

The jurisdictional test in *McLain* derives from the Court's consideration of an intrastate conspiracy. Plainly, it is not the test applied to foreign agreements by *Hartford Fire*. *See generally Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 75 (3d Cir. 2000) ("*McLain* controls when subject matter jurisdiction over domestic conduct is at issue."). Petitioners insist that they were entitled to proceed under *McLain* notwithstanding the foreign agreements at issue here, because there were U.S. sales in this case while "*Hartford Fire* was a case about concerted refusal to sell." Pet. 12. But in *Hartford Fire* the London reinsurers sold their policies containing limited reinsurance coverage in the United States and the conspiracy actually limited primary coverage available in the United States. 509 U.S. at 795-96. Even assuming a meaningful distinction between the sales in this case and the coverage limitations in *Hartford Fire*, Petitioners ignore that *Alcoa* applied the intended and actual "effects" test to a foreign agreement despite ensuing U.S. sales. 148 F.2d at 442-44; *see also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2, 9 (1st Cir. 1997) (applying *Hartford Fire* to foreign conspiracy where conspirators controlled sales prices in the United States).

The divergence between the test applied to domestic conduct in *McLain* and the test applied to foreign conduct in *Hartford Fire* is indisputable. Petitioners could not be more wrong in arguing that the validity of the Fourth Circuit's affirmance depends on reading *Hartford Fire* as *sub silentio* "cutting back" *McLain*. Pet. 9-12. The cases are unrelated. *McLain* relied on nine of this Court's precedents (all domestic-agreement cases) in support of its jurisdictional test, but did not cite any of the cases that *Hartford Fire* relied

on for the foreign-conduct test. *McLain* and *Hartford Fire* are wholly independent branches of this Court's Sherman Act jurisprudence.[6]

III. THE FOURTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE HOLDINGS OF OTHER CIRCUITS.

A. The Fourth Circuit's affirmance is wholly consistent with the two cases with which Petitioners claim it conflicts: *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), and *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000).

In *Nippon Paper*, the defendants "held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America." 109 F.3d at 2. The court noted that the defendants:

> accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. . . . [The

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[6] Citing *McLain*, 444 U.S. at 243, Petitioners assert that they were entitled to injunctive relief despite their failure to prove substantial effect. Pet. 9. *McLain*, however, states only that a plaintiff who fails to prove "legally cognizable damages" may still obtain injunctive relief. 444 U.S. at 243. *Hartford Fire* makes clear that substantial effect is an element of jurisdiction. 509 U.S. at 795-96 & nn.21-22. As such, substantial effect is a prerequisite to liability, not a component of damages. Petitioners also incorrectly assert that *McLain* relied on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969), for their point. *McLain* did not cite *Zenith* regarding injunctive relief, but instead for the proposition that a "plaintiff's failure to quantify the adverse impact of defendant's conduct" is not a bar to jurisdiction. *McLain*, 444 U.S. at 243.

> lead defendant] monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged.

Id.

The United States indicted the defendants, arguing that price-fixing activities which took place entirely in Japan were prosecutable because they were intended to have, and did in fact have, substantial effects in this country. *Id.* Declaring that a criminal antitrust prosecution could not be based on wholly extraterritorial conduct, the District Court dismissed the indictment. *Id.* The First Circuit reversed and reinstated the indictment.

The court began its analysis: "In *Hartford Fire*, the Justices endorsed *Alcoa*'s core holding, permitting civil antitrust claims under Section One to go forward despite the fact that *the actions which allegedly violated Section One occurred entirely on British soil.*" *Id.* at 4 (emphasis added). The First Circuit rejected the defendants' arguments that the Sherman Act could not reach their agreements formed in Japan, holding that *Hartford Fire* applies with equal force in civil and criminal cases: "*Hartford Fire* definitively establishes that Section One of the Sherman Act applies to *wholly foreign conduct* which has an intended and substantial effect in the United States. . . . [W]e are also bound to apply it by interpreting Section One the same way in a criminal case." *Id.* at 9 (emphasis added).

Like the foreign agreements in *Hartford Fire*, *Alcoa*, and this case, the meetings in Japan constituted the "wholly foreign conduct" that *Nippon Paper* described. Petitioners' attempt to distinguish *Nippon Paper* on the ground that there were no U.S. acts in furtherance in that case, Pet. 15, ignores that the conspirators controlled U.S. sales prices through intermediaries. 109 F.3d at 2.

In *Carpet Group*, U.S. importers of oriental rugs conspired in the United States to derail the plaintiffs' attempts to enable U.S. retailers to purchase rugs directly from foreign manufacturers. 227 F.3d at 63-64. The plaintiffs sought to eliminate the U.S. importers as middlemen, and the importers responded by forming concerted refusals to deal, boycotts, and other agreements to protect their turf and put the plaintiffs out of business. *Id.*

The *Carpet Group* defendants successfully moved the District Court to dismiss the case under the Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a ("FTAIA"). 227 F.3d at 65. The Third Circuit disagreed with the District Court, holding that the defendants' restraints on imports did not implicate the FTAIA's purpose of "facilitating the export of domestic goods by . . . relieving exporters from a competitive disadvantage in foreign trade." 227 F.3d at 71-72. (Likewise, the FTAIA is not at issue here because Petitioners did not allege restraints on export commerce.)

The *Carpet Group* defendants argued alternatively that the dismissal should be affirmed under *Hartford Fire* because the plaintiffs failed to demonstrate a substantial effect on U.S. commerce. The court rejected that argument and held that *McLain* rather than *Hartford Fire* applied because the defendants had conspired within the United States:

> *McLain controls when subject matter jurisdiction over domestic conduct is at issue.* We reject the defendants' reliance on *Hartford Fire*, because it dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct. *The instant case deals primarily with conduct in the United States, namely concerted action by United States importer/wholesalers directly to affect the domestic retail oriental rug market.*

Id. at 75 (emphasis added to highlight text omitted from Petitioners' quotation at Pet. 14-15).

In sum: *Nippon Paper* applied *Hartford Fire* to a price-fixing conspiracy formed in Japan where the conspirators allegedly fixed the price of a product sold in the United States. *Carpet Group* declined to apply *Hartford Fire*—and instead applied *McLain*—to a boycott and refusal-to-deal conspiracy formed in the United States. Here, the Fourth Circuit affirmed the application of *Hartford Fire* to a conspiracy formed exclusively in Southeast Asia where the conspirators allegedly fixed the price of a product sold in the United States. The judgment in this case is therefore entirely consistent with the results in *Nippon Paper* and *Carpet Group*. *See* Pet. App. 26a ("As in *Nippon Paper*, the agreements here were all formed entirely outside the United States—in several other countries."); *id.* ("Just as the Third Circuit looked at a mass of conduct and concluded it was 'primarily' domestic in *Carpet Group*, so examining all of the conduct here, we can only conclude that it is primarily foreign.") (citing *Carpet Group*, 227 F.3d at 75). Thus, this case does not present any conflict among the circuits, let alone a well-percolated and considered conflict.

Petitioners' attempts to conjure up conflict from extraneous statements in the opinion below are futile: "this Court reviews judgments, not opinions . . . ." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In accord with *Hartford Fire*, *Alcoa*, *Nippon Paper*, and *Carpet Group*, the Fourth Circuit relied primarily on the conspiracy's formation outside the United States. Pet. App. 27a ("[A]lthough we have explained that we do not find this factor alone dispositive, we consider it significant that not one of the conspirators' many meetings took place in the United States."). The court's additional consideration of the "target market" was merely a rephrasing of the "intent" element of the *Hartford Fire* test, which would have applied

anyway given the agreements' formation abroad. The Fourth Circuit's only extraneous consideration was the national affiliation of the conspiracy participants, but that consideration pointed in the same direction as the location of the conspiracy's formation and therefore made no difference to the outcome of this case:

> [T]he rubber-thread conspiracy was formulated and furthered at numerous meetings, all of which took place in Southeast Asia, with attendees, all of whom worked for Southeast Asian firms . . . . Only a few of the participants had any United States affiliation, and each of those also had a primary Southeast Asian affiliation.

Pet. App. 27a.

If anything, because Petitioners alleged a conspiracy formed entirely outside the United States, the Fourth Circuit's consideration of national affiliation *was more generous to Petitioners* than warranted by *Hartford Fire*, providing them an additional basis upon which to argue that this was a domestic case. Accordingly, Petitioners' claim that "[r]eview by this Court is necessary to resolve the conflict in the circuits and to provide guidance for the lower courts on the meaning of *Hartford Fire* when mixed U.S.-foreign cartels are challenged," Pet. 15, is misguided: this is not a "mixed" case. It is undisputed that the conspiracy was formed outside the United States. For that reason, *Hartford Fire* applies.

B. Petitioners' parade of horribles is similarly misguided. The Fourth Circuit's opinion will not hamper public or private enforcement. Indeed, the Fourth Circuit's affirmance of the jury's verdict is consistent with the Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations (1995), § 3.11 (discussing *Hartford Fire*:

"Whether [U.S. imports] in fact produce the requisite substantial effects will depend on the facts of each case."). If anything, the opinion's dictum would make it easier to establish jurisdiction than warranted by *Hartford Fire*. Pet. App. 24a. ("*McLain* might well apply to . . . a conspiracy, even though the acts that constituted the illegal agreement took place exclusively abroad.").

Petitioners' numbered points at Pet. 18 are equally unavailing. The first two are simply wrong: *Hartford Fire* applied the intended and actual "substantial effect" test to a claim with both foreign and domestic conspirators. 509 U.S. at 795-96. The third point attempts to reduce to absurdity the opinion's dictum—aiming an otherwise "primarily domestic" conspiracy at other markets in addition to the United States will not trigger the *Hartford Fire* test. The fourth point is wrong because the Fourth Circuit did not accord more favorable rights to any Respondent based on foreign ownership, nor did it distinguish between those based here or abroad.

Throughout, Petitioners argue as if the *Hartford Fire* test were somehow fatal to a plaintiff's case (although they did not see it that way as of the fifth day of trial). But in *Hartford Fire* the plaintiffs met the substantial-effect requirement through their allegations of coverage limitations. *Id.* at 795-96. The only difference between *Hartford Fire* and this case is that upon the motions to dismiss in *Hartford Fire*, the allegations of substantial effect were accepted, while in this case *the jurors* obviously did not find that any agreement actually caused higher U.S. prices (the only effect alleged). As the Fourth Circuit recognized, despite Petitioners' failure of proof here, "the federal courts will provide redress for those who can show that the harm of which they complain had a substantial effect on our commerce." Pet. App. 27a. Petitioners' loss at trial was due to a failure of proof, not an insurmountable legal test.

CONCLUSION

Given Petitioners' waivers at trial and on appeal, the correct result on appeal (including affirmance of a fact-bound jury verdict), and the lack of a circuit split, this case does not raise a question warranting this Court's review. The petition should be denied.

Respectfully submitted,

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